

2007137 (Migration) [2020] AATA 5527 (16 December 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	2007137
MEMBER:	Kira Raif
DATE:	16 December 2020
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl.820.211(2)(d)(ii) of Schedule 2 to the Regulations

Statement made on 16 December 2020 at 8:24pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – Federal Circuit Court remittal – application made more than 28 days after last substantive visa held – compelling reasons to waive criterion – visa history, including requests for ministerial consideration and court proceedings – long-term, genuine relationship not in itself a compelling reason – emotional and financial support – conversion to Christianity, but no evidence of activity – requirement of military service – credibility – some evidence exaggerated and some gaps in knowledge of sponsor’s finances – no finding on nature of relationship – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2, cl 820.211; Schedule 4, PIC 3001

CASES

Babicci v MIMIA (2005) 141 FCR 285

Chan v MIBP [2017] FCCA 2883

MZYPZ v MIAC [2012] FCA 478

Nazir v MIBP [2018] FCCA 861

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

Application for review

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 16 December 2013 on the basis of his relationship with his sponsor. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate found that the applicant did not meet Public Interest Criterion 3001 and found there were no compelling reasons for its waiver.
3. The applicant sought review of the delegate's decision. In September 2016 the Tribunal (differently constituted) affirmed the decision under review. The applicant sought judicial review of the Tribunal's decision and in March 2020 the Court remitted the matter to the Tribunal for reconsideration.
4. The applicant appeared before the Tribunal on 15 December 2020 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic and English languages. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

Relevant law

5. At the time the application was made, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
6. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
7. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria.
8. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2).

Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

9. The primary decision record indicates that the applicant first entered Australia in January 2008 holding a Student visa, which expired in March 2010. The applicant then made an application for another visa, which was not successful before the delegate and the Tribunal, and he made two requests for Ministerial consideration, which were not considered.
10. The Tribunal finds, having regard to that evidence, that the applicant last held a substantive visa before the expiry of his Student visa in March 2010. He did not have a substantive visa since that time and he was not a holder of a substantive visa at the time the application for

the Partner visa was made. There is nothing to suggest that the applicant entered Australia as a holder of a Subclass 995 (Diplomatic) visa or as a special purpose visa holder. The Tribunal is not satisfied the applicant meets cl. 820.211(d)(i).

11. The applicant is required to satisfy the Schedule 3 criterion 3001 for the purpose of cl. 820.211(d)(ii). There is nothing before the Tribunal to indicate that the applicant held an entry permit that was valid up to and including 31 August 1994. There is nothing to indicate that the applicant became an illegal entrant before 1 September 1994. There is nothing to indicate that the applicant ceased to hold a criminal justice visa on or after 1 September 1994 or that he entered Australia unlawfully on or after 1 September 1994. There is nothing to suggest that the last substantive visa held by the applicant was cancelled and the Tribunal has made a decision to set aside and substitute the cancellation decision.
12. The Tribunal has found that the applicant ceased to hold a substantive visa when his Student visa expired in March 2010. The Tribunal finds that that date is the 'relevant day' within the meaning of subclause 3001(2)(c)(i) of Schedule 3. As the application for the Partner visa was made in July 2013, the Tribunal is not satisfied that the application was validly made within 28 days after the relevant day. The Tribunal is not satisfied that the applicant meets Item 3001.
13. Clause 820.211(d)(ii) allows for this criterion to be waived if the Tribunal is satisfied that there are compelling reasons for not applying the criterion.

Compelling reasons

14. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
15. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
16. The applicant claims that he and the sponsor are in a long term genuine relationship and that the sponsor would be adversely affected if they were to be separated. The applicant provided a number of documents to the delegate and the Tribunal concerning his relationship with the sponsor, addressing different aspects of the relationship. The Tribunal acknowledges that evidence. The Tribunal has considerable concerns about the nature of the present relationship, which are noted below. However, even if it was established that the applicant and sponsor are in a genuine and long-term relationship, in the Tribunal's view, that in itself and without something more, is not sufficient to establish the existence of a compelling reason for not applying the Schedule 3 criteria.
17. The criteria in cl.820.211(2)(a) is that the applicant is the spouse or de facto partner of the sponsoring partner. This, in part, requires the applicant and the sponsor to be in a genuine, continuing and exclusive relationship. If an applicant does not hold a substantive visa and does not meet the Schedule 3 criteria, the requirement in cl.820.211(2)(d)(ii) to provide compelling reasons for not applying those criteria is in addition to the criteria in cl.820.211(2)(a). Accordingly, simply the fact that the parties are in a genuine and continuing relationship is not of itself a compelling reason for not applying the Schedule 3 criteria as it is already a criteria which must be satisfied in order to meet the criteria in cl.820.211(2)(a). If the

relationship itself can be considered a compelling reason for not applying the Schedule 3 criteria, it must be the particular aspects of the relationship which must provide a compelling reason for not applying the Schedule 3 criteria and not simply the fact that the parties are in a relationship.

18. Since the existence of a genuine spousal relationship is the basic requirement for a partner visa application, the Tribunal is not satisfied that the genuineness, mutual commitment, emotional support, continuing nature and longevity of the parties' relationship or the parties' temporary separation are on their own and without more, circumstances that should compel the Tribunal to not apply the Schedule 3 criteria. The Tribunal is not satisfied on the evidence that the parties' relationship is a compelling reason for not to apply the Schedule 3. In reaching this conclusion, the Tribunal has had regard to the reasoning in *Chan v MIBP* [2017] FCCA 2883 at [14] and *Nazir v MIBP* [2018] FCCA 861 at [29]–[30].
19. The Tribunal is prepared to accept that the applicant provided emotional support to the sponsor when she had a miscarriage, although the Tribunal is also mindful that eight years have now passed since the miscarriage. If the applicant does continue to provide emotional support at present, the Tribunal is of the view that the ability to provide emotional support is not limited to circumstances where parties live in the same household, or even the same country. The Tribunal is of the view that it is possible to provide emotional support where parties do not live in the same country. It is not uncommon, for example, for partners in a spousal relationship to live in different countries for a variety of reasons. There is no suggestion that in such circumstances, emotional support cannot continue. There is no reason why in the present case, the applicant and the sponsor cannot continue to communicate by electronic means, if the applicant was required to leave the country and await the outcome of any future visa application offshore while the sponsor remains in Australia. The Tribunal does not consider that the emotional support will cease, if it is being provided now.
20. The applicant states that the sponsor has not worked since March 2020 on a full-time basis but works casually and he provides her with financial support. The applicant states that he pays for all expenses and supports the sponsor emotionally and financially. The applicant told the Tribunal that he and the sponsor have savings of about \$4000-5000 and his partner is also receiving Centrelink payments of about \$500 - \$560 a fortnight. (The applicant said he did not think the sponsor informed Centrelink about their de facto relationship). The Tribunal requested the applicant to provide the sponsor's bank statements to support his evidence of the sponsor's financial reliance upon him and the applicant did provide some bank statements following the hearing, but these do not show the sponsor's income from Centrelink and it appears that the parties have other bank accounts which have not been disclosed to the Tribunal. The Tribunal is prepared to accept that the applicant provides some financial support to the sponsor. However, the Tribunal is not satisfied the sponsor needs to rely on the financial support provided by the applicant. This is because the sponsor has income from Centrelink, as well as access to the applicant's savings and income from her own employment, albeit casual. The applicant claims that these funds are not sufficient to cover all expenses and the applicant referred to the various expenses of his family but there is little documentary evidence before the Tribunal to confirm these expenses. On the very limited documentary evidence before it, the Tribunal is not satisfied that the sponsor needs to rely on the applicant for financial support. As such, the Tribunal does not consider the couple's financial affairs constitute a compelling reason for the waiver.
21. The applicant told the Tribunal that he has not been allowed to work for four years in the past and had to borrow money, which he is still repaying. Again, the applicant presented no evidence of the loans or of the repayments. Even if the applicant is repaying the loan, in the absence of any evidence that such repayments cause him financial hardship, the Tribunal does not consider the need to repay a loan constitutes a compelling reason for the waiver.

22. The applicant told the Tribunal that he has left his religion in 2016 and it is dangerous for him to return to his home country as he may be killed by the extremists. Following the hearing the applicant provided to the Tribunal evidence of his baptism, although he presented no evidence of having participated in any religious activities or of having otherwise engaged in religious observance since the baptism, which in the Tribunal's view, brings into question the applicant's motivations for the conversion. Nevertheless, the Tribunal accepts that the applicant had completed a baptism ceremony. He may thus be perceived as a Christian in his home country. DFAT country information report on Egypt, issued in June 2019, states that Christianity is recognised as one of the state religions, however, it also refers to some violence against Christians in recent years.
23. The applicant told the Tribunal that if he has to return to Egypt, he would have to serve in the army for three years and he would not be allowed to renew his passport or leave the country. The applicant states that his partner would not be able to work in Egypt and would only be able to see him once a month. The Tribunal is not convinced that the sponsor would travel to Egypt with the applicant, if he is required to travel. Nevertheless, the Tribunal accepts that the requirement to complete three years of military service would cause considerable hardship to the applicant, particularly because he would have limited or no opportunity to engage in paid employment, travel and communicate with his family.
24. The Tribunal has formed the view that many of the issues raised by the applicant do not amount to compelling circumstances. The Tribunal is also of the view that at least some of the applicant's evidence has been exaggerated, for example, the applicant's claim that the sponsor relies on him financially and the claimed level of emotional support shared by the parties. However, the Tribunal accepts that the applicant will be required to complete a three year military service in Egypt, when he would be unable to travel freely in and out of the country or earn a living and will have only limited contact with his family, at best. There is also some support for the applicant's claim that he may be targeted as a Christian, whatever his motivations were for the conversion. On balance, the Tribunal accepts that the combination of these matters amounts to a compelling reason for not applying the Schedule 3 criteria. Accordingly, the applicant meets cl.820.211(2)(d)(ii).
25. The Tribunal has considerable concerns about the nature of the applicant's relationship with the sponsor. The Tribunal has formed the view that the applicant did not have adequate knowledge about the sponsor's finances. He could not state what kind of Centrelink payment the sponsor received or whether her payment includes rental assistance. The applicant also informed the Tribunal that he did not believe the sponsor informed Centrelink about the de facto relationship. The applicant's evidence to the Tribunal is that the sponsor had a separate bank account where her Centrelink payments and her income from employment are deposited. The Tribunal is also concerned about the applicant's credibility as his oral evidence appeared to shift in response to the questions from the Tribunal. However, the Tribunal is mindful that the nature of the applicant's relationship with the sponsor has not been assessed by the delegate. The Tribunal makes no findings on the issue.

Conclusion

26. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

27. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl.820.211(2)(d)(ii) of Schedule 2 to the Regulations

Kira Raif
Senior Member